1986

Charlie Brown Construction Co., Inc., a Nevada corporation, Charlie Brown and Carma Brown v. Leisure Sports Incorporated, a Nevada corporation, West Village Unit No. One, Mt. Holly Recreation Community, Conrad H. Koning, and Amy J. Koning : Brief of Respondent

Utah Supreme Court

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John L. Miles; Wright & Miles; Attorney for Appellants.

KET NO. 860119-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

CHARLIE BROWN CONSTRUCTION CO., INC., a Nevada corporation, CHARLIE BROWN and CARMA BROWN, Plaintiffs-Appellants, vs. LEISURE SPORTS INCORPORATED, a Nevada corporation, WEST VILLAGE UNIT NO. ONE, MT. HOLLY RECREATION COMMUNITY, CONRAD H. KONING, and AMY J. KONING, Defendants-Respondents.	860119-CA Case No. 20645

BRIEF OF RESPONDENTS

Appeal from Judgment of Fifth Judicial
District Court of Beaver County,
State of Utah,
the Honorable J. Harlan Burns,
District Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

CHARLIE BROWN CONSTRUCTION CO., INC., a Nevada corporation, CHARLIE BROWN and CARMA BROWN, Plaintiffs-Appellants, vs. LEISURE SPORTS INCORPORATED, a Nevada corporation, WEST VILLAGE UNIT NO. ONE, MT. HOLLY RECREATION COMMUNITY, CONRAD H. KONING, and AMY J. KONING, Defendants-Respondents.	Case No. 20645

BRIEF OF RESPONDENTS

LIST OF ALL PARTIES. All parties to this proceeding are listed in the above caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT RULES

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Does a trial Court have inherent authority to dismiss, sua sponte, an action for lack of prosecution?

2. What is the proper standard of review on appeal when a Court sua sponte dismisses a case?

3. Is a Court bound by a procedural stipulation between parties?

4. Did the Court abuse its discretion in denying Plaintiffs' Motion to Set Aside Dismissal?

STATEMENT OF THE CASE

Appellant appeals from an Order denying Plaintiffs' Motion to Set Aside Order of Dismissal, and Order Affirming Dismissal with Prejudice, filed April 4, 1985. The Order was issued pursuant to a hearing held March 18, 1985.

STATEMENT OF FACTS

An exhaustive review of the record follows. It is set forth in detail inasmuch as the Trial Court reviewed the entire file orally during the March 18, 1985, hearing from which the Browns appeal.

The Plaintiffs (hereinafter "the Browns") filed a Complaint on June 15, 1981, through counsel (hereinafter "Mr. Miles") against Defendants (hereinafter "the Konings") to force the Konings to complete road improvements that the Konings allegedly represented would be done at their expense. After the Browns posted a non-resident cost bond, the Konings answered on July 6, 1981.

For ten and one-half months no activity appeared in the Court file. Finally, on May 24, 1982, the Browns noticed a Deposition

and also filed a Motion to Amend Complaint (Record, Page 15-16). On June 14, 1982, a hearing was held on the Browns' Motion to Amend Complaint. Mr. Miles did not appear at the hearing, and the Motion was denied subject to renewal at a later date (Record, Page 19). The Motion was never renewed. On June 16, 1982, the Notice of Taking Deposition filed May 27, 1982 was refiled, and the Deposition was scheduled for July 9, 1982 (Record, Page 17).

On June 21, 1982, an appearance of co-counsel (hereinafter "Mr. Maycock") was filed on behalf of Defendants (Record, Page 20). On July 9, 1982, and July 16, 1982, the Konings filed two Motions for Protective Orders (Record, Pages 23-27). The Motions requested that Defendants depositions not be taken. They did not speak to any other discovery methods, and in fact, were never ruled on by the Court. From the time Defendants' Motions were filed until April 4, 1983, a period of almost nine months, the Court file showed no activity. The Browns did not resist the Konings' Motion, nor did they attempt other discovery such as Requests for Admissions or Interrogatories.

On October 26, 1982, the Konings original counsel (hereinafter "Mr. Thorley") filed a withdrawal of counsel and mailed copies to co-counsel, Mr. Maycock, and to Mr. Miles (Record, Page 28).

On April 4, 1983, the Browns filed Interrogatories with the Court. The Mailing Certificate on the Interrogatories shows that they were mailed to Mr. Thorley only (Record, Page 34), who had withdrawn from the case some six and one/half months earlier (Record, Page 28). The Browns never mailed the Interrogatories to

Mr. Maycock, and Mr. Miles blamed this oversight on his secretary (Transcript, Page 3, lines 20-22).

The Court file shows no activity for eight months until December 5, 1983, when the Court, on its own motion, filed an Order to Show Cause why the case should not be dismissed for failure to prosecute, and a Notice of Pretrial Hearing, both to be heard on March 19, 1984 (Record, Pages 35-36). During this eight-month hiatus, the Browns never contacted the Konings to ascertain why the Interrogatories had not been answered (Record, Page 39). Neither did they move the Court for sanctions pursuant to Rule 37 of the Utah Rules of Civil Procedure. On the morning of March 19, 1984, the parties, through counsel, contacted the Court and asked for a continuance. A Minute Entry was filed noting that a continuance had been granted until April 16, and that neither party had appeared at the hearing (Record, Page 42).

In the latter part of March, 1984, a flurry of activity appears in the Court file. An Amended Mailing Certificate and Letter from Mr. Miles to Mr. Maycock was filed March 22, 1984 (Record, Page 39). On March 28, 1984, the Court on its own motion again filed an Order to Show Cause and a Notice of Pretrial Hearing, both to be heard April 16, 1984 (Record, Pages 40-41). On April 16, 1984, a Minute Entry filed with the Court reflects that a Pretrial Hearing was held on the case. No one appeared. The matter was continued for 6 days (Record, Page 42). On April 19, 1984, a Stipulation regarding Interrogatories, was filed with the Court. The Stipulation was signed by counsel for both parties, and paragraph 3 stated:

3. That this matter should be stricken from the Courts' Pretrial calendar until the parties have completed their discovery or until either party requested a Pretrial conference (Record, pages 43-44).

On April 30, 1984, the Trial Court, on its' own Motion, mailed to counsel of record, Notice of Trial Setting scheduled for June 18, 1984 (Record, Page 45). Mr. Miles states that he called the Trial Court executive and informed her of the Stipulation on file in the Court (Transcript, Page 6, lines 10-12). On May 19, 1984, the Trial Court executive changed the non-jury trial to a Pretrial Hearing, and sent notice to the parties (Record, Page 46).

Mr. Miles states that he contacted the Court before the June 18, 1984 hearing, and discussed with the Court a settlement between the parties (Transcript, Page 6, lines 15-29). According to Mr. Miles, the Judge told him that neither party would need to attend the Pretrial Hearing (Transcript, Page 7, lines 1-4). On June 18, 1984, the matter was called on for hearing at the Pretrial Conference. No one appeared on behalf of either party. The Court noted that the matter had been set several times for Pretrial and no one had ever appeared. The Court ordered the matter dismissed with prejudice and on the merits. The Court further stated:

> The Minute Entry will serve as the Order of Dismissal. A copy is to be mailed to the respective parties. (Emphasis added) (Record, Page 48)

On June 28, 1984, the District Court Clerk mailed copies of the Minute Entry to Mr. Miles and Mr. Maycock (Record, Page 49).

Over seven and one-half months passed from the time the Court mailed the Minute Entry to Mr. Miles until the Browns filed a Motion

to Set Aside Dismissal and Affidavit of John Miles on February 25, 1985 (Record, Pages 52-56). During this time, Mr. Maycock filed a Notice of Withdrawal of Counsel (Record, page 50). On March 18, 1985, the Konings filed an Affidavit in Opposition to Motion to Set Aside Dismissal (Record, Page 58). Among other things, the Konings claimed that during the seven and one-half month interim from the signing of the Minute Entry, the Konings had sold their shares in Leisure Sports, Inc., and that the Konings and the buyers of the stock had relied on the Minute Entry as part of the decision to sell and buy the stock of the corporation. Also on March 18, 1985, Browns filed a Memorandum in Support of Motion to Set Aside Dismissal, and also filed a letter from Mr. Miles to a Mr. Hardy, the Browns' Nevada attorney (Record Pages 61-90).

On March 18, 1985, the Browns' Motion came on for hearing. Mr. Miles was present as counsel for the Browns, Mr. Russell J. Galliar appeared as counsel for the Defendants. Both counsel argued the matter. Exhibits were offered by the Browns; some were received into evidence, some were excluded after objection. The matter was fully presented to the Court, and the Court reviewed the entire file orally in Open Court. Thereafter the Browns' Motion was denied, and an Order Denying Motion to Set Aside Order of Dismissal, and Order Affirming Dismissal with Prejudice were filed April 4, 1985.

On April 24, 1985, Plaintiff filed a Notice of Appeal and Cost Bond. The Browns filed an Appellants' Brief with the Supreme Court on September 9, 1985.

SUMMARY OF ARGUMENTS

A trial court has the inherent ability to dismiss a lawsuit for lack of prosecution, and after a hearing on the matter, this trial court did not abuse its discretion by so doing.

Furthermore, the trial court is not bound by a procedural stipulation between parties, especially after a long period of time and where circumstances have changed dramatically.

Finally, the lower Court acted properly in excluding various exhibits offered at the hearing on Browns' Motion to Set Aside Dismissal.

ARGUMENTS

I.

A TRIAL COURT CAN, SUA SPONTE, DISMISS AN ACTION WITH PREJUDICE FOR LACK OF PROSECUTION.

The Browns contend that the language of Rule 41(b) Utah Rules of Civil Procedure, by negative implication, prohibits involuntary dismissals for failure of the Plaintiff to prosecute except upon motion by the Defendant (Brief of Appellants, Page 13). This is simply untrue. In Brasher Motor & Finance Company v. Brown, 23 Utah 2d 247, 461 P.2d 464 (1969), the trial court on its own motion dismissed the action. Defendants appealed, contending that the court had no authority to dismiss because of Rule 41 URCP. This Court stated:

> In dismissing an action for want of prosecution, the court may proceed under the statute [URCP 41(b)], or it may, of its own motion, take action to that end. In acting on its own motion, the court must proceed with judicial discretion. Its ruling will not be disturbed on appeal unless it is manifest from the record that the court's discretion has been abused. 23 Utah 2d at 248, 461 P.2d at 465.

Later Utah decisions have followed this rule. See K.L.C. Incorporated v. McLean, 656 P.2d 986 (Utah 1982); Wilson v. Lambert, 613 P.2d 765 (Utah 1980).

The Supreme Court of the United States was faced with this same issue relating to Rule 41(b) of the Federal Rules of Civil Procedure, after which the Utah rule is fashioned. In Link v. Wabash R.Co., 370 U.S. 626, 630 (1962) the Court stated:

> Neither the permissive language of the rule--which merely authorizes a motion by the defendant--nor its policy requires us to conclude that it was the purpose of the rule to abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs to as to achieve the orderly and expeditious disposition of cases.

Utah case law and the great weight of authority gives a Court "inherent authority" to dismiss cases for lack of prosecution.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SUA SPONTE, DISMISSED THE CASE FOR FAILURE TO PROSECUTE.

Whether an action should be dismissed for failure to diligently prosecute rests largely within the discretion of the trial court. Grundman v. Williams & Peterson, 685 P.2d 539 (Utah 1984). On review the trial court's decision will not be interfered with unless it clearly appears that the court has abused its discretion. Department of Social Services v. Romero, 609 P.2d 1323 (Utah 1980);

Thompson Ditch Co. v. Jackson, 29 Utah 2d 259, 508 P.2d 528 (1973); Brasher Motor & Finance Co. v. Brown, supra.

Beginning with Westinghouse Elec. Supply Co. v. Paul W. Larsen Construction, Inc., 544 P.2d 876 (Utah 1975) a series of cases arising out of Rule 41(b) Motions to Dismiss made by one of the parties, have enunciated factors that a trial court should consider when ruling on a motion made by one of the litigants. See also, Polk v. Ivers, 561 P.2d 1075 (Utah 1977); Utah Oil Co. v. Harris, 565 P.2d 1135 (Utah 1977); Department of Social Services v. Romero, supra. Utah Oil Co. v. Harris, supra, enumerated the Westinghouse factors as follows:

1. The conduct of both parties.

2. The opportunity each has had to move the case forward.

3. What each of the parties has done to move the case forward.

4. What difficulty or prejudice may have been caused to the other side.

5. And, most important, whether injustice may result from the dismissal.

The Utah Oil case also mentions a standard as to whether or not the mere lapse of time in prosecuting a claim for relief is sufficient to support a dismissal with prejudice. The Court cited Crystal Lime & Cement Co. v. Robbins, 8 Utah 2d 389, 335 P.2d 624 (1959), for the proposition that where all of the litigants have power to obtain relief and have failed to do so, it is error to dismiss with prejudice.

This list of considerations affecting a party seeking dismissal under Rule 41(b) stems in part from a fear that through chicanery, a party can intentionally delay a case and then move for dismissal. In Department of Social Services v. Romero, 565 P.2d at 1325, the Court stated:

> [W]e are not impressed with either (the) fairness or propriety in one party sitting silently by for a long period of time, then attempting to blame the other party for the delay as a means of escaping the effects of a judgment.

The cases cited above are all procedurally different than this case, however. In those cases, a litigating party moved under Rule 41(b) for dismissal. Here, the Court dismissed the action on its own motion.

In stating the standard for review where a court, on its own motion, has dismissed a lawsuit for failure to prosecute the Court said:

> In acting on its own motion, the Court must proceed with judicial discretion. Its ruling will not be disturbed on appeal unless it is manifest from the record that the Court's discretion has been abused. Brasher Motor & Finance Co. v. Brown, 23 Utah 2d at 248, 461 P.2d at 465.

The United States Supreme Court case of William Link v. Wabash R. Co., supra, is in agreement.

In reviewing a trial court's dismissal for lack of prosecution brought sua sponte, this Court need only consider whether the trial court abused its discretion. The trial court need only have focused on the duty of the Plaintiff to move the case along, whether Plaintiff had any justifiable excuse for failure to do so, and whether or not the Defendant unduly delayed or hindered Plaintiff's efforts.

It is the Plaintiff upon whom the duty rests to use diligence at every stage of the proceeding to expedite his case to a final determination. Thran v. First Judicial District Court, 380 P.2d 297 (Nev. 1963). The Colorado Supreme Court in Rathburn v. Sparks, 425 P.2d 296, 299 (Colo. 1967) stated:

> If a person starts the law in motion, and does not within reasonable promptness pursue all the steps necessary to bring the litigation to an end, he should suffer the penalty of a default, and a dismissal of the action. It is not contended here that any duty rested upon the defendant to take any affirmative action, and, on principle, it is not [the defendant's] duty to make any move whatever, except such as the law required it to make in response to the steps initiated by the plaintiff.

A trial court should not put an affirmative burden upon a Defendant to move a case forward, unless the Defendant has filed a counterclaim. A court should look to whether or not the Defendant has hindered the Plaintiff's efforts to move the case ahead, and what, if any, actions Plaintiff has taken to compel Defendant to respond to Plaintiff's efforts.

The court should not be forced to look deeply into the issue of whether injustice may result from the dismissal either. As was stated above, it is the Plaintiff's duty to move a case forward. If there is no justifiable excuse for failure to prosecute, a trial court has the power, in its discretion, to control its calendar and dismiss a case with prejudice.

III.

A TRIAL COURT IS NOT BOUND BY PROCEDURAL STIPULATIONS BETWEEN PARTIES WHERE CONDITIONS HAVE MATERIALLY CHANGED AND SPECIAL CIRCUMSTANCES EXIST RENDERING ENFORCEMENT OF THE STIPULATION UNJUST.

On April 19, 1984, a "Stipulation Regarding Interrogatories" was filed with the court. It allowed Defendants to have 30 additional days to respond to Interrogatories, and paragraph 3 stated:

> 3. That this matter should be stricken from the Court's Pretrial Calendar until the parties have completed their discovery or until either party requests a Pretrial Conference.

Thereafter, a Pretrial Hearing, set by the court, was held on June 18, 1984. When neither party appeared, the court ordered the matter dismissed with prejudice and on the merits.

The Browns contend on appeal that the court and the Konings were bound by the Stipulation, that the court abused its discretion by disregarding the filed Stipulation, at the Pretrial Hearing, and again, during the hearing when Browns' Motion to Set Aside Dismissal was denied.

In First of Denver Mortgage Investors v. C. M. Zundell & Associates, 600 P.2d 521, 527 (Utah 1979), this Court set forth the general rule as to stipulations when it stated:

> Ordinarily, courts are bound by stipulations between parties (Citations omitted). Such is not the case, however, when points of law requiring judicial determination are involved (Citations omitted). Parties are bound by their stipulations unless relieved therefrom by the court, which has the power to set aside a stipulation entered into inadvertently or for justifiable cause. (Citations omitted; emphasis added).

Some Courts have drawn a distinction between stipulations relating to substantive rights, and those relating to procedural matters, holding that stipulations merely procedural in nature are not binding upon the Court. Wechsler v. Zen, 2 Mich. App. 438, 140 NW 2d. 581 (1966); Palliser v. Home Tel. Co., 170 Ala. 341, 54 S.499 (1966). See also, TIF Instruments, Inc. v. Collette, 713 F.2d 197 (6th Cir. 1983).

In Harsh Building Company v. Bialac, 22 Ariz. App. 591, 529 P.2d 1185 (1975), a state trial court set aside certain stipulations entered into between the parties in Federal District Court after the case was remanded to the state court for lack of Federal jurisdiction. In upholding the trial court's refusal to enforce the stipulations, the appellate court cited Los Angeles City School District v. Landier Management Co., 177 Cal. App. 2d 744, 2 Cal. Rptr. 662, 665-666 (1960) for the proposition that:

> The Court, in the exercise of its sound discretion, may set aside a stipulation entered into through inadvertance, excusable neglect, fraud, mistake of fact or law, where the facts stipulated have changed or there has been a change in the underlying conditions that could not have been anticipated, or where special circumstances exist rendering it unjust to enforce the stipulation.

A court should have the ability to disregard procedural motions that keep cases pending indefinitely. Public policy dictates that a court have the ability to control its calendar and dismiss cases for failure to prosecute. Stipulations that limit indefinitely a trial court's ability to do so should not be sacrosanct. It should be within the sound discretion of the trial court to ignore such stipulations.

In the instant case, a stipulation signed by counsel was filed with the Court on April 19, 1984. The trial court apparently disregarded the stipulation and two months later dismissed the action with prejudice. Copies of the Minute Entry were mailed to counsel on June 28, 1984. Mr. Miles admited receiving the Minute Entry, but did nothing about it until he was called by Mr. Brown in January, 1985, whereupon Mr. Miles became aware of the Minute Entry (See Transcript, page 7, lines 13-25).

After the June 18, 1984, hearing where the Judge dismissed the case, but before Mr. Miles acted on the Minute Entry some seven months later, the Konings sold their shares in Leisure Sports, Inc., to a third party. The Konings materially changed their position in reliance upon the Minute Entry by stating to the buyer of the stock that there was no litigation pending against Leisure Sports, Inc. The third party purchaser relied on the Konings' assertions in deciding to purchase the stock. (See Affidavit of the Konings). Because of this material change in circumstances, it would be unjust to enforce the Stipulation, and the Trial Court did not abuse its discretion at the hearing on Motion to Set Aside Dismissal by disregarding the stipulation.

IV.

THE LOWER COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE BROWNS' MOTION TO SET ASIDE DISMISSAL.

An analysis of the facts of this case under the standards discussed above, shows that this case has not been prosecuted

diligently, that no justifiable excuse exists for this failure, and that Konings are not at fault for such failure.

A. The record reveals a total lack of diligence by the Browns in prosecuting this action.

Facts that support this assertion are as follows:

1. For ten and one-half months following the Konings' Answer, no activity appears in the Court file.

2. The ten and one-half month hiatus ended when the Browns filed a Motion to Amend Complaint (Record, Page 16). When the motion came before the Court, the Browns did not attend the hearing and the motion was denied subject to renewal at a later date (Record, Page 19). The motion was never renewed.

3. At the same time, the Browns also noticed the deposition of Mr. Koning (Record, Page 17). The Konings filed two Motions for Protective Orders as to the deposition (Record, Pages 21-24). The motions stated that a Federal Court had granted a protective order such that information discovered in the Federal action not be disclosed or used except in that action. The state Court never ruled on this motion, and, in fact, nothing ever happened. The Browns made no motion objecting to the Protective Order, nor did they attempt to pursue other discovery devices at that time.

4. Another ten months elapsed before the Browns filed Interrogatories with the Court. When the Browns mailed the interrogatories to the Konings, they only mailed Interrogatories to Mr. Thorley (Record, Page 34), who had withdrawn from the case six and one-half months earlier (Record, page 28). The Browns never

bothered to mail Interrogatories to Mr. Maycock, who filed a Notice of Appearance as co-counsel some ten months earlier. This mistake was blamed on Mr. Miles secretary (Transcript Pg. 3, Lines 20-22; Record, Page 20). Mr. Thorley never forwarded the Interrogatories to Mr. Maycock.

These Interrogatories sat unanswered for one year because the Browns had not mailed them to Konings' proper counsel. During the year, the Browns never tried to make contact to ascertain why the Interrogatories were not being answered, nor did the Browns apply for an order from the Court compelling discovery as set forth in Rule 37, URCP.

5. After receiving an Order to Show Cause why the case should be dismissed for lack of prosecution, the Browns finally discovered that the Konings had never received the Interrogatories (Record, Page 39). The Browns thereafter entered into a Stipulation with the Konings striking the case from the court's pretrial calendar "until the parties have completed their discovery, or until either party requests a Pretrial Conference." The Stipulation also granted the Konings 30 days to answer the Interrogatories (Record, Page 43). Before the Stipulation was filed, the Court again noticed the matter for a Pretrial Hearing (Record, Page 40). Mr. Miles alleges that he talked to the court on two separate occasions immediately before the hearing, and was informed that neither he nor counsel for the Konings needed to appear at the hearing (Transcript, Page 6, lines 1-2; Page 7, lines 1-4). While the record does not clearly state this, it is obvious that the trial court did not believe that Mr.

Miles had made this contact that he claimed. Accordingly, when the matter came on for hearing, and no one showed up for either side, the court dismissed the action with prejudice (Record, page 48). Mr. Miles claims he did not become aware of this dismissal until months had expired and even then, he did not file the Motion to Set Aside Dismissal until some six weeks later.

Had the Browns followed the spirit of the Stipulation, they should have been "completing discovery," or attempting settlement in the matter even after the June 18, 1985 Minute Entry of which they were not aware. The point is they had done nothing to prosecute the case before, and did nothing after the dismissal. The record is void of any such activity. The Browns did not contact the Konings after the 30-day extension had run and no Answers to Interrogatories had been received. Nor did they move under Rule 37 for an Order compelling discovery. Neither did they attempt any other forms of discovery. In fact, at the March 18, 1985, hearing on the Browns' Motion to Set Aside Dismissal, Mr. Miles stated that the Minute Entry had been mailed to him but that:

> [I]t was right at that time that two of our secretaries had quit and we hired two more, and for some reason this notice didn't come to my attention. It was placed in the file and sat there until Mr. Brown called me sometime in January asking about his case and I said, 'Well, haven't you settled with Mr. Koning?' And he indicated that it had not been accomplished. After the passage of that six-month period of time, I assumed that the two of them, since he had not gotten back in touch with me, had worked something out on their own. (Tr., p. 7, lines 13-24).

By Mr. Miles' own admission, he did nothing for nearly eight months after the Minute Entry. The Browns did not honor the terms

of the Stipulation that they now claim the Court should have enforced.

6. The critical aspect of this case turns on the fact that Mr. Miles received a copy of the Minute Entry dated June 18, 1984, notifying him that the case had been dismissed, and he did nothing about it for over eight months. Mr. Miles attempts to excuse his non-action by claiming that his secretaries did not bring the matter to his attention (Transcript, Page 7, lines 13-24). If attorneys were allowed to hide behind the alleged mistakes of their secretaries, legal secretaries would carry malpractice insurance because attorneys would blame them whenever mistakes were made in law offices.

The reason that Mr. Miles' neglect of the Minute Entry assumes such importance is that after the entry, but before Mr. Miles learned of the entry, the Konings, relying on the Minute Entry, sold their entire interest in Leisure Sports, Inc., to a third party. During this interim then, circumstances had materially changed.

The Browns should have made a Rule 60(b) motion immediately after receiving the Minute Entry of June 18, 1984. The Browns state that ". . . an unsigned Minute Entry does not constitute a final judgment." They claim that they could not have appealed this Minute Entry to the Supreme Court until a final judgment or order appeared in the record (Appellant's Brief Pages 11-12). The Browns' point is well taken. Their proper course after receiving the Minute Entry complained of was the corrective remedy provided by Rule 60(b) of the Utah Rules of Civil Procedure, which authorizes the reopening of cases in which orders have been inadvisedly entered. Rule 60(b) reads in pertinent part as follows:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice, relieve a party or his legal representative from any final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertenence, surprise, or excusable neglect; . . . or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than three months after the judgment, order, or proceeding was entered or taken.

A Motion to Set Aside the Dismissal because of mistake, inadvertenence, surprise, or excusable neglect, would have been proper before the court if made within three months of the Minute Entry. But, because of Mr. Miles' neglect in this matter, the reasons of mistake, inadvertenance, surprise, or excusable neglect could not be used to have the case set aside because a motion was not made within three months of the Minute Entry.

Furthermore, because of the change in circumstances after the Minute Entry, there remained no justification to move under Rule 60(b)(7).

The Browns' failure to move timely to set aside the dismissal should not be visited upon the Konings or the third party who bought Leisure Sports, Inc.

7. Even in taking this appeal, the Browns have been less than diligent. Rule 9(a), Utah Rules of Appellate Procedure, states that "within 21 days after the Notice of Appeal . . . is filed, the Appellant, . . . shall file a Docketing Statement with the Clerk of the Supreme Court."

In this case, the Browns' Notice of Appeal was filed May 2, 1985. Under Rule 9(a), Utah Rules of Appellate Procedure the Browns

had until May 23, 1985 to file a Docketing Statement. The Browns did not prepare and mail the Docketing Statement until June 19, 1985, a period of 48 days, more than twice the time allowed for under the rules. Rule 9(e) Utah Rules of Appellate Procedure states that "failure to comply may result in dismissal of the appeal or petition." The Konings ask this Court to dismiss Browns' appeal for failure to comply with the rule.

B. The Konings did not cause the Browns undue delay in this action.

1. When Browns filed their Complaint, the Konings answered within the statutory time period allowed by law. When Depositions were scheduled, the Konings made a Motion for Protective Order. The Browns never objected to the Konings' Motion, and cannot now claim that the Motion was made to hinder and delay the lawsuit.

2. The Konings cannot be blamed for not answering Interrogatories that Mr. Miles mailed to counsel who had withdrawn from the case six and one-half months prior to the mailing of the Interrogatories. The Browns cannot complain that Mr. Thorley (Konings' counsel who withdrew) should have forwarded the Interrogatories to Mr. Maycock, who had appeared as co-counsel some ten months prior to the mailing of the Interrogatories. Mr. Miles was on notice that Mr. Maycock was counsel for the Konings, and it was his responsibility to mail Interrogatories to the proper counsel.

3. The Konings did stipulate to answer the Browns Interrogatories within 30 days in a Stipulation filed with the Court April 19, 1984. Those Interrogatories never were answered.

However, the Browns never contacted the Konings concerning the Interrogatories, nor did the Browns move the Court for an order compelling discovery pursuant to Rule 37, URCP. Furthermore, a mere two months after this Stipulation was filed, the Court dismissed the case with prejudice. The June 18, 1984 Minute Entry which dismissed the case stated in part: "The Minute Entry will serve as the Order of Dismissal." Thus there would be no need to file answers to the Interrogatories; the Stipulation had become moot.

Even if this Court reviews this case using the factors set forth in Westinghouse, supra, the facts set forth above show that the Trial Court did not abuse its discretion in dismissing this action.

V.

THE LOWER COURT DID NOT ERR IN EXCLUDING VARIOUS EXHIBITS OFFERED TO SUPPORT THE MOTION TO SET ASIDE DISMISSAL.

When an evidentiary hearing is to a court, the rulings on evidence are not of such critical moment as when a hearing is to a jury, because it is to be assumed that the court has, and will use, its superior knowledge as to the competency and the effect which should be given evidence. Super Tire Market, Inc. v. Rollins, 18 Utah 2d 122, 417 P.2d 132 (1966). Further, a judgment will not be reversed for an alleged error in the exclusion of evidence unless it appears in the record that the error was prejudicial. Downey State Bank v. Major-Blakeney Corp., 578 P.2d 1286 (Utah 1978).

In this case, the evidentiary hearing was held before the Court, the Court had a chance to pass on the evidence after hearing

counsel's objections and offers of proof. Furthermore, the Browns have not shown that the alleged errors by the Court in excluding the evidence were prejudicial.

CONCLUSION

This Court should affirm the orders of the lower Court which denied relief from the Minute Entry and dismissed the Browns' Complaint with prejudice and on the merits.

RESPECTFULLY submitted this 8th day of October, 1985.

RUSSELL J. GALLIAN
Attorney for Defendants-
Respondents

CERTIFICATE OF HAND DELIVERY

I hereby certify that four true and correct copies of the foregoing Respondent's Brief were hand delivered this 9th day of October, 1985 to Counsel for Appellate, to wit:

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